

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Larry Eugene Varvel, ) No. CIV 11-0278-PHX-FJM (DKD)  
Petitioner, )  
vs. )  
Charles L. Ryan, et al., ) **REPORT AND RECOMMENDATION**  
Respondents. )

## **REPORT AND RECOMMENDATION**

TO THE HONORABLE FREDERICK J. MARTONE, U. S. DISTRICT JUDGE:

16 Larry Eugene Varvel filed a timely Petition for Writ of Habeas Corpus pursuant to 28  
17 U.S.C. § 2254 on February 10, 2011, and an Amended Petition on March 4, challenging his  
18 convictions for sexual conduct with a minor and sexual abuse of a minor, and the imposition  
19 of a five-year prison term to be served consecutively to a life sentence. In Ground One,  
20 Varvel alleges that the victim was coerced and lied. He also contends that his sixth  
21 amendment rights were violated because his attorneys did not impeach the inconsistencies  
22 in another witness’s testimony. In Ground Two, Varvel challenges the sufficiency of the  
23 evidence and the credibility of the witnesses. Respondents allege that the grounds are either  
24 not cognizable on habeas review or unexhausted and procedurally defaulted. For the reasons  
25 stated below, the Court recommends that the petition be denied and dismissed with prejudice.

## BACKGROUND

27 The facts surrounding the convictions are summarized in the court of appeals  
28 memorandum decision:

1                   The victim is a child who is developmentally delayed,  
2 and is Defendant's step-granddaughter. The victim and her  
3 mother, Lisa, who is also developmentally delayed, previously  
4 lived with Defendant and his wife, Nancy, her maternal  
5 grandmother. Defendant and his wife were involved with  
6 overseeing the care of both Lisa and her daughter.

7                   Nancy died on December 1, 2006, after a long illness.  
8 After she passed away, Defendant continued to do things with  
9 his step-granddaughter, including taking her to church and to the  
10 zoo. One night before Christmas in 2006, Lisa and the child  
11 spent the night at Defendant's house.

12                  A few days later, Defendant called Lisa to ask if he could  
13 take the child to church. Lisa's son, Sam, who was visiting at  
14 the time, answered the phone and asked the child whether she  
15 wanted to go to church with Defendant. The child looked at  
16 Sam with "fear in her eyes like . . . something had happened,"  
17 and then told him that Defendant had touched her. This was the  
first time that Sam had ever seen such a look on the child's face,  
and the first time she had ever expressed a reluctance to go with  
Defendant. When he saw the look on her face, Sam told  
Defendant he would call him back and hung up.

18                  Sam was confused and upset by his sister's declaration.  
19 He immediately took her to the home of Lisa's older sister, his  
20 Aunt Darci, to ask her advice on how to proceed. The child  
21 "provide[d] details" to Darci about what Defendant had done  
and why she did not want to go to church with him. The child  
was "very fearful, very scared, and very upset." Darci had never  
seen her niece "with the demeanor she had that day." Darci  
instructed Sam to call the police. Phoenix Police Officers  
responded and interviewed Sam and Darci separately.

22                  The following day the child was taken to John C. Lincoln  
23 Hospital for an examination. The hospital reported the matter  
24 to the Maricopa County Sheriff's Office, and Detective Rodrigo  
25 Rojas contacted the family. After he talked to Sam, the  
detective made arrangements to have the child interviewed and  
examined at Child Help "because she needed to be interviewed  
by a more skilled or specially trained forensic interviewer."

22                  The child was interviewed on January 3, 2007, by  
23 Michele Becker ("Becker"), an investigative interview specialist  
24 trained in interviewing developmentally delayed children, at the  
25 Phoenix Child Help Children's Center. Prior to the interview,  
Becker reviewed an initial police report, met with Rojas, and  
also spoke with Darci and Lisa. She then conducted her  
recorded forensic interview of the child.

26                  During the interview, the child told Becker that  
27 Defendant had "touched her" while her grandmother was in  
heaven. She explained that the event had occurred at

1                   Defendant's house, while mommy was asleep on the couch. The  
2 child pointed between her legs and stated that he had put lotion  
3 down there, and took off her clothes and "kissed my titties." She also said that Defendant touched her "pee pees" and  
described Defendant's hand going into her "pee pees."

4                   Jacqueline Hess ("Hess"), a family nurse practitioner for  
5 Child Help, conducted a thorough medical examination of the  
6 child. The results of the overall physical and genital  
examinations rendered "completely normal" results. Hess was  
not surprised because "more than 95 percent" of children that  
report sexual abuse have normal examinations. She testified  
that there were many reasons for the normal examination,  
including, for example, the amount of time between the event  
and the examination, the fact that genital tissue heals very  
rapidly, or the fact that the type of sexual contact that occurred  
might not have created any type of injury.

10                  The detective interviewed Defendant in February 2007,  
11 and he denied any wrongdoing. He was arrested in June 2007,  
12 and charged with sexual conduct with a minor under the age of  
fifteen, a Class 2 felony, and dangerous crime against children,  
and sexual abuse of a minor under the age of fifteen, a Class 3  
felony, and dangerous crime against children.

13                  (Doc. 13, Exh H at 2-5).

14                  On direct review, Varvel argued two errors by the trial court: (1) the denial of his  
15 Rule 20 motion for judgment of acquittal because of insufficient evidence of sexual conduct  
16 with a minor; and (2) the admission of an unredacted report of the victim's forensic medical  
17 examination (*Id.*, Exh E). On December 22, 2009, the court of appeals affirmed Varvel's  
18 convictions and sentences. In doing so, the court determined that (1) the State had presented  
19 sufficient evidence of sexual conduct with a minor; (2) the statements contained in the  
20 medical report were properly admitted for the limited purpose of demonstrating what  
21 information the nurse had before examining the victim; and (3) there was no confrontation  
22 clause violation in the admission of the medical report because the statements were not  
23 admitted for the truth of the matter asserted (*Id.*, Exh H).

24                  On January 12, 2010, Varvel filed a Notice of Post-Conviction Relief (*Id.*, Exh I).  
25 Appointed counsel filed a Notice of Post-Conviction Review, indicating to the trial court that  
26 she had reviewed the record and could find no colorable claim for relief (*Id.*, Exh K). The  
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1 trial court granted Varvel leave to file a *pro per* petition (*Id.*, Exh L). Varvel filed a letter  
2 dated June 18, 2010 in which he argued the following: (1) trial counsel was ineffective for  
3 failing to ask certain questions of the State's witnesses; (2) the victim was told what to say  
4 by her brother and sister; and (3) the evidence was insufficient to support the convictions  
5 (*Id.*, Exh M). The trial court determined that the letter did not comply with the filing  
6 procedures outlined in Ariz. R. Crim. P. 32.5, and granted Varvel additional time to file a  
7 proper petition. Varvel filed a second letter setting forth similar claims; on September 9,  
8 2010, he filed a post-conviction relief form, attaching his June 18 letter to the form (*Id.*, Exh  
9 O, P). The State argued in its response that the petition should be dismissed because it did  
10 not comply with the rules, it failed to raise any proper claims, cite to the record or any  
11 applicable case law, or allege any facts which would entitle him to relief (*Id.*, Exh Q). The  
12 trial court summarily dismissed the petition (*Id.*, Exh S).

13 **EXHAUSTION OF REMEDIES**

14 A state prisoner must exhaust his state remedies before petitioning for a writ of habeas  
15 corpus in federal court. 28 U.S.C. § 2254(b)(1) & (c); *Duncan v. Henry*, 513 U.S. 364, 365-  
16 66 (1995); *McQueary v. Blodgett*, 924 F.2d 829, 833 (9<sup>th</sup> Cir. 1991). To properly exhaust  
17 state remedies, a petitioner must fairly present his claims to the state's highest court in a  
18 procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 839-846 (1999). In  
19 Arizona, a petitioner must fairly present his claims to the Arizona Court of Appeals by  
20 properly pursuing them through the state's direct appeal process or through appropriate post-  
21 conviction relief. *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9<sup>th</sup> Cir. 1999); *Roettgen v.*  
22 *Copeland*, 33 F.3d 36, 38 (9<sup>th</sup> Cir. 1994). A claim has been fairly presented if the petitioner  
23 has described both the operative facts and the federal legal theory on which the claim is  
24 based. *Bland v. Cal. Dep't of Corrections*, 20 F.3d 1469, 1472-73 (9<sup>th</sup> Cir. 1994), *overruled*  
25 *on other grounds by Schell v. Witek*, 218 F.3d 1017, 1025 (9<sup>th</sup> Cir. 2000) (en banc); *Tamalini*  
26 *v. Stewart*, 249 F.3d 895, 898 -99 (9<sup>th</sup> Cir. 2001). The exhaustion requirement will not be  
27 met where the Petitioner fails to fairly present his claims. *Roettgen*, 33 F.3d at 38.

If a petition contains claims that were never fairly presented in state court, the federal court must determine whether state remedies remain available to the petitioner. *See Rose v. Lundy*, 455 U.S. 509, 519-20 (1982); *Harris v. Reed*, 489 U.S. 255, 268-270 (1989) (O'Connor, J., concurring). If remedies are available in state court, then the federal court may dismiss the petition without prejudice pending the exhaustion of state remedies. *Id.* However, if the court finds that the petitioner would have no state remedy were he to return to the state court, then his claims are considered procedurally defaulted. *Teague v. Lane*, 489 U.S. 288, 298-99 (1989); *White v. Lewis*, 874 F.2d 599, 602-605 (9<sup>th</sup> Cir. 1989). The federal court may decline to consider these claims unless the petitioner can demonstrate that a miscarriage of justice would result, or establish cause for his noncompliance and actual prejudice. *See Schlup v. Delo*, 513 U.S. 298, 321 (1995); *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 86 (1977); *United States v. Frady*, 456 U.S. 152, 167-68 (1982).

Further, a procedural default may occur when a Petitioner raises a claim in state court, but the state court finds the claim to be defaulted on procedural grounds. *Coleman*, 501 U.S. at 730-31. In such cases, federal habeas review is precluded if the state court opinion contains a plain statement clearly and expressly relying on a procedural ground "that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *See Harris*, 489 U.S. at 260. A state procedural default ruling is "independent" unless application of the bar depends on an antecedent ruling on the merits of the federal claim. *See Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985); *Stewart v. Smith*, 536 U.S. 856 (2002). A state's application of the bar is "adequate" if it is "'strictly or regularly followed.'" *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (quoting *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982)). In cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, just as in cases involving defaulted claims that were not fairly presented, federal habeas review of the claims

1 is barred unless the prisoner can demonstrate a miscarriage of justice or cause and actual  
2 prejudice to excuse the default. *See Coleman*, 501 U.S. at 750-51.

## DISCUSSION

In Ground One, Varvel argues that the victim was coerced into giving her statement to the investigative specialist, and lied about the incident. He also argues that trial counsel was ineffective for not pointing out the inconsistencies in the testimony of Lisa, the victim's mother. In Ground Two, he argues about the credibility of witnesses' testimony, essentially contending that such testimony was insufficient evidence to convict him. Varvel's sufficiency of the evidence claim was not raised on direct review as a federal constitutional claim. Proper exhaustion requires that Varvel have fairly presented to the state courts the exact federal claim he is raising in his federal habeas petition, and in doing so describe the facts and federal legal theory upon which the claim is based. *Bland*, 20 F.3d at 1472. Because Varvel failed to alert the state court to a federal constitutional claim, his sufficiency of the evidence claim is unexhausted. *O'Sullivan*, 526 U.S. at 845. Because a return to state court would be futile, the claim is procedurally defaulted. *Teague*, 489 U.S. at 297-99.

16 His remaining claims that trial counsel was ineffective, and that the victim was  
17 coerced, were raised in his post-conviction petition, which the trial court dismissed for failure  
18 to present a colorable claim for relief. Varvel failed to petition for review in either the  
19 Arizona Court of Appeals or the Arizona Supreme Court. Because of this, these claims were  
20 never properly exhausted, and because these claims cannot be raised in a successive post-  
21 conviction petition, a return to state court would be futile. Therefore, these claims are also  
22 procedurally defaulted. Finally, Varvel has shown no miscarriage of justice or cause and  
23 actual prejudice to excuse the default. *See Coleman*, 501 U.S. at 750-51.

24           **IT IS THEREFORE RECOMMENDED** that Larry Eugene Varvel's Amended  
25 Petition for Writ of Habeas Corpus be **denied and dismissed with prejudice** (Doc. 6).

1           **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave  
2 to proceed *in forma pauperis* on appeal be **denied** because dismissal of the Petition is  
3 justified by a plain procedural bar and jurists of reason would not find the ruling debatable.

4           This recommendation is not an order that is immediately appealable to the Ninth  
5 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of  
6 Appellate Procedure, should not be filed until entry of the district court's judgment. The  
7 parties shall have fourteen days from the date of service of a copy of this recommendation  
8 within which to file specific written objections with the Court. *See*, 28 U.S.C. § 636(b)(1);  
9 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen  
10 days within which to file a response to the objections. Failure timely to file objections to the  
11 Magistrate Judge's Report and Recommendation may result in the acceptance of the Report  
12 and Recommendation by the district court without further review. *See United States v.*  
13 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003). Failure timely to file objections to any  
14 factual determinations of the Magistrate Judge will be considered a waiver of a party's right  
15 to appellate review of the findings of fact in an order or judgment entered pursuant to the  
16 Magistrate Judge's recommendation. *See* Rule 72, Federal Rules of Civil Procedure.

17           DATED this 13<sup>th</sup> day of September, 2011.

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21           David K. Duncan  
22           United States Magistrate Judge  
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